

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

LISA COLLEY, Individually and on  
Behalf of All Others Situated,

Plaintiff,

v.

OREXIGEN THERAPEUTICS, INC., *et*  
*al.*,

Defendants.

GERALD J. STEFANKO, Individually  
and on Behalf of All Others Similarly  
Situated

v.

OREXIGEN THERAPEUTICS, INC., *et*  
*al.*,

Defendants.

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Civil No. 15cv540 L (KSC)  
Civil No. 15cv549 JAH (JLB)  
Civil No. 15cv557 L (KSC)

**ORDER GRANTING MOTIONS  
FOR CONSOLIDATION [ECF Nos.  
26, 29, 32]; GRANTING MOTION  
FOR APPOINTMENT OF LEAD  
PLAINTIFF [ECF No. 37] and  
DENYING MOTIONS FOR  
APPOINTMENT OF LEAD  
PLAINTIFF [ECF Nos. 27, 33];  
GRANTING MOTION FOR  
APPROVAL OF LEAD  
PLAINTIFF'S SELECTION OF  
COUNSEL [ECF No. 38] and  
DENYING MOTIONS FOR  
APPROVAL OF LEAD COUNSEL  
[ECF Nos. 28, 34, 35]**

1 KURT R. YANTZ and CLAUDIA  
 2 KNIGHT, Individually and on Behalf of  
 All Others Similarly Situated,

3 v.

4 OREXIGEN THERAPEUTICS, INC., *et*  
 5 *al.*,

6 Defendants.  
 7

8 Three related putative class action lawsuits alleging violations of §§ 10(b) and 20(a) of  
 9 the Securities Exchange Act of 1934 (“Exchange Act”) and Securities Exchange Commission  
 10 (“SEC”) Rule 10b-5, 17 C.F.R. §240.10b-5, are pending before the Court. Plaintiffs bring these  
 11 actions on behalf of all purchasers of Orexigen Therapeutics, Inc. (“Orexigen”) securities  
 12 between March 3, 2015 and March 5, 2015, against Orexigen, and two senior executive officers,  
 13 Michael A. Narachi and Joseph P. Hagan. Various parties now seek to consolidate the three  
 14 cases, and move for appointment as lead plaintiff and for appointment of lead counsel. The Court  
 15 determines the motions on the papers submitted without oral argument.

#### 16 **A. Motions to Consolidate Cases**

17 All parties agree that consolidation of the three cases is appropriate because they each  
 18 involve substantially similar issues of law and fact. *See* FED. R. CIV. P. 42(a). Each of the related  
 19 actions allege that Orexigen made false or misleading statements or failed to disclose to  
 20 investors that (1) the studies released by Orexigen showing that its obesity drug, Contrave,  
 21 reduced the risk of heart attacks and cardiovascular death were unreliable and misleading; (2)  
 22 Orexigen was confronted by potential fines, civil penalties, and recall of Contrave from the  
 23 market; and (3) consequently, Orexigen’s financial statements were materially false and  
 24 misleading at the relevant times. Having reviewed the pleadings, the Court concurs that  
 25 consolidation of the related actions is warranted. *See* 15 U.S.C. §78u-4(a)(3)(B)(ii).

#### 26 **B. Motion for Appointment as Lead Plaintiff**

27 The Private Securities Litigation Reform Act (“PSLRA”), 15 U.S.C. § 78u–4, governs  
 28 the selection of a lead plaintiff in private securities class actions: the lead plaintiff is to be the

1 “most capable of adequately representing the interests of class members.” 15 U.S.C. §  
2 78u–4(a)(3)(B)(i). There is a three-step process in determining the lead plaintiff under the  
3 PSLRA. *In re Cavanaugh*, 306 F.3d 726, 729 (9th Cir. 2002). The first plaintiff to file an action  
4 governed by the PSLRA must publicize the pendency of the action, the claims made, and the  
5 purported class period “in a widely circulated national business-oriented publication or wire  
6 service.” 15 U.S.C. § 78u–4(a)(3)(A)(i)(I). This notice must also alert the public that “any  
7 member of the purported class may move the court to serve as lead plaintiff.” 15 U.S.C. §  
8 78u–4(a)(3)(A)(i)(II).

9 Next, the court must select the presumptive lead plaintiff. *See In re Cavanaugh*, 306 F.3d  
10 at 729–30 (citing 15 U.S.C. § 78u–4(a)(3)(B)(iii)(I)). In order to determine the presumptive lead  
11 plaintiff, “the district court must compare the financial stakes of the various plaintiffs and  
12 determine which one has the most to gain from the lawsuit.” *Id.* at 730 (footnote omitted). After  
13 the court identifies the plaintiff with the most to gain, the court must determine whether that  
14 plaintiff, based on the information he provides, “satisfies the requirements of Rule 23(a), in  
15 particular those of ‘typicality’ and ‘adequacy.’” *Id.* If that occurs, that plaintiff becomes the  
16 presumptive lead plaintiff. *Id.* If not, the court selects the plaintiff with the next-largest financial  
17 stake and determines whether that plaintiff satisfies the requirements of Rule 23. *Id.* The court  
18 repeats this process until it selects a presumptive lead plaintiff. *Id.*

19 Finally, plaintiffs not selected as the presumptive lead plaintiff may “rebut the  
20 presumptive lead plaintiff’s showing that it satisfies Rule 23’s typicality and adequacy  
21 requirements.” *Id.* (citing 15 U.S.C. § 78u–4(a)(3)(B)(iii)(II)). This is accomplished by  
22 demonstrating the presumptive lead plaintiff either “will not fairly and adequately protect the  
23 interests of the class” or “is subject to unique defenses that render such plaintiff incapable of  
24 adequately representing the class.” 15 U.S.C. § 78u–4(a)(3)(B)(iii)(II)(aa)-(bb). If the court  
25 determines that the presumptive lead plaintiff does not meet the typicality or adequacy  
26 requirement, then it must return to step two, select a new presumptive lead plaintiff, and again  
27 allow the other plaintiffs to rebut the new presumptive lead plaintiff’s showing. *In re Cavanaugh*,  
28 306 F.3d at 731. The court repeats this process “until all challenges have been exhausted.” *Id.*

(citation and footnote omitted).

## 1. Notice

On March 10, 2015, Lisa Colley filed the first of the three related cases. On that same date, Notice of the class action suit was published in *Business Wire*, a national business-oriented publication. The Notice publicized the pendency of the action, the claims made, and the purported class period “in a widely circulated national business-oriented publication or wire service.” 15 U.S.C. § 78u–4(a)(3)(A)(i)(I). The Notice also alerted the public that “any member of the purported class may move the court to serve as lead plaintiff.” 15 U.S.C. § 78u–4(a)(3)(A)(i)(II).

## 2. Largest Financial Interest

The movants have provided information concerning their financial losses in this litigation:

Movant Karim Khoja asserts losses of approximately \$74,181. [ECF No. 37-3];

Movant Hau Dang asserts losses of approximately \$44,182. [ECF No. 35-4];

The Orexigen Investors Group asserts losses of approximately \$21,800. [ECF No. 27-5];

Movant Nicholas Mennona asserts losses of approximately \$11,868. [ECF No. 33-5].

As noted above, the PSLRA provides that “the ‘most capable’ plaintiff – and hence the lead plaintiff – is the one who has the greatest financial stake in the outcome of the case,” so long as that plaintiff meets the requirements of Federal Rule of Civil Procedure 23. *In re Cavanaugh*, 306 F.3d at 729. It is undisputed that Karim Khoja has the largest financial interest in this matter.

Khoja also has established that he satisfies the requirements of Rule 23(a), specifically typicality and adequacy. *See In re Cavanaugh*, 306 F.3d at 732. Here, Khoja’s claims arise from the same course of conduct and the same operative facts that allegedly damaged other members of the purported class: Khoja purchased Orexigen’s securities during the Class Period in reliance upon defendants’ purported false and misleading statements, and suffered damages as a result. Thus, Khoja’s claims are typical under Rule 23.

The test for adequacy is meant to determine whether the class representative and his

counsel “have any conflicts of interest with other class members” and whether the class representative and his counsel will “prosecute the action vigorously on behalf of the class.” *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). There is no suggestion of conflicts between Khoja and other class members. Nor is there any showing that Khoja is subject to any unique defenses

Khoja’s interests are not antagonistic to those of the class members and he has sufficient interest in the outcome of the litigation to ensure that he will vigorously prosecute it. Accordingly, the Court finds that, for purposes of lead plaintiff appointment, Khoja has made a showing satisfying the adequacy requirement of Rule 23.

Because Khoja has the greatest financial stake and satisfies the requirements of Rule 23(a), he is presumptively the most adequate plaintiff to represent the class. This presumption may be rebutted only upon proof by a member of the purported plaintiff class that Khoja either (1) “will not fairly and adequately protect the interests of the class,” or (2) “is subject to unique defenses that render [it] incapable of adequately representing the class.” 15 U.S.C. § 78u4(a)(3)(B)(iii)(II). No party has opposed Khoja's motion for appointment as lead plaintiff. Accordingly, the presumption that Khoja is the most adequate lead plaintiff has not been rebutted, and the Court therefore need not proceed to consider the motion of the movant with the next largest financial stake. *See In re Cavanaugh*, 306 F.3d at 730–31. Absent proof that the lead plaintiff candidate with the largest financial interest does not satisfy the requirements of FRCP 23, said candidate is “entitled to lead plaintiff status.” *In re Cavanaugh*, 306 F.3d at 732. Thus, Khoja is entitled to be the lead plaintiff in this action.

## **B. Motion to Appoint Counsel**

Under the PLSRA, the lead plaintiff is given the right, subject to court approval, to “select and retain counsel to represent the class.” 15 U.S.C. § 78u–4(a)(3)(B)(v). “[T]he district court should not reject a lead plaintiff's proposed counsel merely because it would have chosen differently.” *Cohen v. U.S. Dist. Court*, 586 F.3d 703, 711 (9th Cir. 2009) (citation omitted). “[I]f the lead plaintiff has made a reasonable choice of counsel, the district court should generally defer to that choice.” *Id.* at 712 (citations omitted).

1 Khoja moves to have his selection of Kahn Swick & Foti, LLC approved as lead counsel.  
 2 The Court has reviewed the firm's resume, *See* Abadou Decl., Exh. D, ECF No. 37-6, and is  
 3 satisfied that the lead plaintiff has made a reasonable choice of counsel. The Kahn Swick & Foti  
 4 firm has extensive experience in the prosecution of securities class actions and it appears that it  
 5 will adequately represent the interests of all class members. Accordingly, the Court defers to  
 6 Khoja's choice in counsel.

7 **D. Conclusion**

8 Based on the foregoing, **IT IS ORDERED:**


9 1. The motions to consolidate cases are **GRANTED**. All documents filed shall bear  
 10 the caption *In re Orexigen Therapeutics, Inc., Securities Litigation*, 15cv540 L (KSC). A  
 11 consolidated amended complaint shall be filed within 20 days of the filing of this Order.  
 12 Defendants shall answer or otherwise respond to the amended consolidated complaint within 20  
 13 days of the filing of the amended consolidated complaint.

14 2. Karim Khoja's motion for appointment as lead plaintiff is **GRANTED**. The  
 15 Orexigen Investor Group, Nicholas Menonna, and Hau Dang's motions for appointment as lead  
 16 plaintiff are **DENIED**.

17 3. Karim Khoja's motion for approval of lead plaintiff's selection of counsel is  
 18 **GRANTED**. The Orexigen Investor Group, Nicholas Menonna, and Hau Dang's motions for  
 19 approval of their selection for lead counsel are **DENIED**.

20 **IT IS SO ORDERED.**

21 DATED: June 22, 2015

22   
 23 M. James Lorenz  
 United States District Court Judge

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1 COPY TO:

2 HON. JOHN A. HOUSTON  
3 UNITED STATES DISTRICT JUDGE

4 HON. KAREN S. CRAWFORD  
5 UNITED STATES MAGISTRATE JUDGE

6 HON. JILL L. BURKHARDT  
7 UNITED STATES MAGISTRATE JUDGE

8 ALL PARTIES/COUNSEL